

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Charter Communications, on behalf of its)	
subsidiaries and affiliates)	CSR 7546-E
)	
Petition for Determination of Effective)	
Competition in Hoover, Alabama)	

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 2011

Released: June 2, 2011

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Charter Communications (“Charter”), on behalf of its subsidiaries and affiliates, has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that Charter is subject to effective competition in the Birmingham suburb of Hoover, Alabama. Charter alleges that its cable system serving Hoover is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in Hoover because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc., and DISH Network. The City of Hoover (“the City”) filed an opposition,³ to which Charter filed a reply.⁴

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁷ For the reasons set forth below, we grant the Petition based on our finding that Charter is subject to effective competition in Hoover, as indicated on Attachment A.

II. THE COMPETING PROVIDER TEST

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ Response in Opposition to Petition for Special Relief (“Opposition”).

⁴ Reply to Response in Opposition to Petition for Special Relief.

⁵ 47 C.F.R. § 76.906.

⁶ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

⁷ See 47 C.F.R. §§ 76.906-.907(b).

programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁸ This test is referred to as the “competing provider” test.

A. The First Part

4. The first part of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁹ It is undisputed that Hoover is “served by” both DBS providers and that these two MVPD providers are unaffiliated with Charter or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.¹⁰ The Commission has held that a party may use evidence of subscribership in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹¹ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹² and is supported in this Petition with copies of channel lineups for both DBS providers.¹³ Also undisputed is Charter’s assertion that both DBS providers offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹⁴ Accordingly, we find that the first part of the competing provider test is satisfied.

B. The Second Part

5. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Charter asserts that it is the largest MVPD in Hoover.¹⁵ The second part of the competing provider test thus required Charter to calculate a ratio, the numerator of which is the number of DBS subscribers in Hoover and the denominator of which is the number of households there.¹⁶

6. For the numerator, Charter purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to

⁸ 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁹ 47 C.F.R. § 76.905(b)(2)(i).

¹⁰ *See* Petition at 2-3.

¹¹ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹² *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4.

¹³ *See* Petition at Exh. 1.

¹⁴ *See* Petition at 2-3.

¹⁵ *See* Petition at 4-5; *id.*, Declaration of Denise Williams, Director of Regulatory Compliance for Charter, at ¶ 3.

¹⁶ The Census Bureau’s detailed definition of “household” is at U.S. Census Bureau, State & County QuickFacts (“A household includes all the persons who occupy a housing unit”) http://quickfacts.census.gov/qfd/meta/long_HSD010200.htm (last visited March 25, 2011). *See, e.g., Marcus Cable Assocs.*, 25 FCC Rcd 4369, 4372, ¶ 9 (2010); *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-467 at ¶ 8 (rel. March 11, 2011), available at 2011 WL 840875; *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-466 at ¶ 8 & n.26 (rel. March 10, 2011), available at 2011 WL 828968; *see also* 47 C.F.R. § 76.905(c) (“household” does “not include those dwellings that are used solely for seasonal, occasional, or recreational use”).

the DBS providers within Hoover on a nine-digit zip code basis.¹⁷ The number is 4,640¹⁸ and the City does not dispute it.¹⁹ We will use this number for purposes of this proceeding.

7. Charter's Petition used the 2000 U.S. Census count of households in Hoover, 25,191.²⁰ The City objected to this number on the general grounds that there is a difference of several years between the dates of this number and the DBS subscriber number that Charter used. This objection is insufficient by itself. We have repeatedly held that a cable operator's showing of competing provider effective competition is not invalid merely because its DBS and household numbers are several years apart.²¹

8. The City, however, provided specific and more recent data concerning households, noting that Hoover is "one of the fastest growing areas in the state of Alabama."²² We have stated that we will accept more recent household numbers if they are as reliable as the most recent decennial Census number.²³ One number presented by the City in its Opposition is a 2006 estimate of households by the Census (30,412).²⁴ The City also presented a 2006 Census estimate of "housing units" (some of which are unoccupied), a 2007 count of housing units by local governments, and two vacancy rates from the Census.²⁵

9. For purposes of adjudicating the present petition, we will use the Census's 2006 estimate of households in Hoover. We have frequently used the Census' household estimates, made after the decennial census.²⁶ The other calculations advanced by the City are inferior because they are relatively complicated and involve unoccupied housing units, which are not households. The 2006 Census household number avoids these pitfalls and is therefore the most valid measure of households from among the available alternatives.

10. The DBS subscriber and housing numbers that we adopted above (4,640 and 30,412, respectively), produce a DBS subscribership in Hoover of 15.26 percent. Therefore, the second part of the competing provider test is satisfied for that franchise area. Based on the foregoing, we conclude that

¹⁷ Petition at 5; *id.* at Exh. 3. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

¹⁸ Petition at Exh. 3 at 1.

¹⁹ See Opposition at 3.

²⁰ Petition at Exh. 4.

²¹ See, e.g., *Time Warner Entertainment-Advance/Newhouse Partnership*, Memorandum Opinion & Order DA 11-495 at ¶ 11 (rel. March 17, 2011), available at 2011 WL 915604 ("Time Warner"); *Insight Kentucky Partners II, L.P.*, Memorandum Opinion & Order DA 11-279 at ¶ 9 (rel. Feb. 14, 2011), available at 2011 WL 496568; *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-429 at ¶ 11 (rel. March 4, 2011), available at 2011 WL 765080.

²² Opposition at 3; see also *id.* at 4 (noting that the 1990 and 2000 Census counts for Hoover showed 56.82% growth in households).

²³ *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-496 at ¶ 39 (rel. March 18, 2011), available at 2011 WL 933540 ("Comcast"); *Time Warner*, *supra* note 21, at ¶ 12; *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14144, ¶ 13 (2008).

²⁴ Opposition at Exh. C.

²⁵ Opposition at 4-5.

²⁶ See, e.g., *Comcast*, *supra* note 23, at ¶ 41; *Comcast Cable Commun., LLC*, 25 FCC Rcd 4782, 4783-84, ¶ 6 (2010); *Comcast Cable Commun., LLC*, 24 FCC Rcd 1780, 1783, ¶ 11 (2009).

Charter has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Charter is subject to effective competition in Hoover, Alabama.²⁷

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Charter Communications on behalf of its subsidiaries and affiliates **IS GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁸

FEDERAL COMMUNICATIONS COMMISSION

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²⁷ We note that the subscribership percentage we have found is only slightly above the statutory minimum. We are constrained by the statute to nevertheless determine the existence of effective competition. Household information based on the 2010 Census is or will soon be available. If the City believes that effective competition is no longer present within its franchise area, it may file a petition for recertification pursuant to Section 76.916 of the Commission's rules. 47 C.F.R. § 76.916.

²⁸ 47 C.F.R. § 0.283.

ATTACHMENT A

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COMMUNITIES SERVED BY SUBSIDIARIES AND AFFILIATES OF CHARTER
COMMUNICATIONS

Community	CUID	CPR*	Census Households	Estimated DBS Subscribers
Hoover	AL0062 AL0531	15.26%	30,412	4640

*CPR = Percent of competitive DBS subscribership.